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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 MIGUEL ASMAR,

11 Plaintiff,

12 v.

13 CAROLYN W. COLVIN, Acting

14 Commissioner of Social Security,

15 Defendant.
16
17

Case No.: 16-cv-01079-GPC-MDD

**REPORT AND
RECOMMENDATION ON
CROSS MOTIONS FOR
SUMMARY JUDGMENT**

[ECF NOS. 20, 21]

18 Plaintiff Miguel Asmar (“Plaintiff”) filed this action pursuant to 42
19 U.S.C. § 405(g) for judicial review of the decision of the Commissioner of
20 the Social Security Administration (“Commissioner”) denying Plaintiff’s
21 applications for a period of disability and disability insurance benefits
22 under Title II and supplement security income payments under Title
23 XVI of the Social Security Act. Plaintiff moves the Court for summary
24 judgment reversing the Commissioner and ordering an award of
25 benefits, or in the alternative, to remand the case for further

1 administrative proceedings. (ECF No. 19). Defendant moves for
2 summary judgment affirming the denial of benefits. (ECF No. 20).

3 For the reasons expressed herein, the Court recommends that
4 Plaintiff's motion be **DENIED** and Defendant's motion be **GRANTED**.

5 I. BACKGROUND

6 A. Factual Background

7 Plaintiff alleges that he became disabled on December 31, 2008,
8 due to several medical and mental conditions, including pain in his
9 right foot and knee, both ankles, right elbow, and jaw; numbness in
10 both hands and his back; pain and arthritis in his neck; wrist damage;
11 loss of concentration; anxiety; and depression. (A.R. at 11, 168).¹

12 Plaintiff's date of birth, June 27, 1974, categorizes him as a younger
13 individual at the time of filing. 20 C.F.R. §§ 404.1563, 416.963; (A.R.
14 216).

15 B. Procedural History

16 On February 29, 2012, Plaintiff filed an application for
17 supplemental security income under Title XVI of the Social Security Act
18 ("Act"), and on March 14, 2012, Plaintiff filed an application for
19 disability insurance benefits under Title II of the Act. (A.R. 11).
20 Plaintiff has filed four prior applications. (A.R. 16). The third
21 application was filed on August 20, 2009, and denied by Administrative
22 Law Judge ("ALJ") J. Carletti on December 27, 2010². (*Id.*, A.R. 102).

23 ¹ "A.R." refers to the Administrative Record filed on August 4, 2016, and
24 is located at ECF No. 11.

25 ² The current ALJ reported December 17, 2010 as the date of the prior
ALJ decision, but the correct date is December 27, 2010. (*Compare* A.R.

1 The Appeal's Council denied review of the ALJ's decision on January 4,
2 2011. (A.R. 16). As to Plaintiff's 2012 applications, his claims were
3 denied initially on October 19, 2012, and denied upon reconsideration
4 on April 17, 2013. (A.R. 11). Plaintiff requested a hearing before an
5 ALJ, and a hearing was held on June 5, 2014, before ALJ Eric V.
6 Benham. (A.R. 29-48). Plaintiff appeared and was represented by
7 counsel. (A.R. 29). Plaintiff and Vocational Expert ("VE") Mark Remas
8 testified at the hearing. (A.R. 32-47).

9 On September 18, 2014, the ALJ issued a written decision finding
10 Plaintiff not disabled. (A.R. 11-21). Plaintiff appealed, and the Appeals
11 Council denied Plaintiff's request to review the ALJ's decision. (A.R.
12 1-3). Consequently, the ALJ's decision became the final decision of the
13 Commissioner. (A.R. 1).

14 On May 3, 2016, Plaintiff filed a Complaint with this Court
15 seeking judicial review of the Commissioner's decision. (ECF No. 1).
16 On August 4, 2016, Defendant answered and lodged the administrative
17 record with the Court. (ECF Nos. 10, 11). On October 18, 2016,
18 Plaintiff moved for summary judgment. (ECF No. 20). On November
19 18, 2016, the Commissioner cross-moved for summary judgment and
20 responded in opposition to Plaintiff's motion. (ECF Nos. 20, 21).

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16, *with* A.R. 102). In any event, the ALJ's typographical error is
inconsequential.

II. DISCUSSION

A. Legal Standard

The supplemental security income program provides benefits to disabled persons without substantial resources and little income. 42 U.S.C. § 1382. To qualify, a claimant must establish an inability to engage in “substantial gainful activity” because of a “medically determinable physical or mental impairment” that “has lasted or can be expected to last for a continuous period of not less than 12 months.” 42 U.S.C. § 1382c(a)(3)(A). The disabling impairment must be so severe that, considering age, education and work experience, the claimant cannot engage in any kind of substantial gainful work that exists in the national economy. 42 U.S.C. § 1382c(a)(3)(B).

The Commissioner makes this assessment through a process of up to five steps. First, the claimant must not be engaged in substantial, gainful activity. 20 C.F.R. § 416.920(b). Second, the claimant must have a “severe” impairment. 20 C.F.R. § 416.920(c). Third, the medical evidence of the claimant’s impairment is compared to a list of impairments that are presumed severe enough to preclude work. 20 C.F.R. § 416.920(d). If the claimant’s impairment meets or is equivalent to the requirements for one of the listed impairments, benefits are awarded. *Id.* If the claimant’s impairment does not meet or is not equivalent to the requirements of a listed impairment, the analysis continues to a fourth and possibly fifth step and considers the claimant’s residual functional capacity. 20 C.F.R. § 416.920(e). At the fourth step, the claimant’s relevant work history is considered along

1 with the claimant's residual functional capacity. *Id.* If the claimant
2 can perform the claimant's past relevant work, benefits are denied. 20
3 C.F.R. § 416.920(f). At the fifth step, if the claimant is found not able to
4 perform the claimant's past relevant work, the issue is whether
5 claimant can perform any other work that exists in the national
6 economy, considering the claimant's age, education, work experience,
7 and residual functional capacity. 20 C.F.R. § 416.920(g). If the
8 claimant cannot do other work that exists in the national economy,
9 benefits are awarded. *Id.*

10 Section 1383(c)(3) of the Social Security Act, through Section
11 405(g) of the Act, allows unsuccessful applicants to seek judicial review
12 of a final agency decision of the Commissioner. 42 U.S.C. §§ 1383(c)(3),
13 405(g). The scope of judicial review is limited, and the Commissioner's
14 denial of benefits "will be disturbed only if it is not supported by
15 substantial evidence or is based on legal error." *Browner v. Secretary of*
16 *Health & Human Services*, 839 F.2d 432, 433 (9th Cir. 1988) (quoting
17 *Green v. Heckler*, 803 F.2d 528, 529 (9th Cir. 1986)).

18 Substantial evidence means "more than a mere scintilla" but less
19 than a preponderance. *Sandgathe v. Chater*, 108 F.3d 978, 980 (9th Cir.
20 1997). "[I]t is such relevant evidence as a reasonable mind might accept
21 as adequate to support a conclusion." *Id.* (quoting *Andrews v. Shalala*
22 53 F.3d 1035, 1039 (9th Cir. 1995)). The court must consider the record
23 as a whole, weighing both the evidence that supports and detracts from
24 the Commissioner's conclusions. *Desrosiers v. Secretary of Health &*
25 *Human Services*, 846 F.2d 573, 576 (9th Cir. 1988). If the evidence

1 supports more than one rational interpretation, the court must uphold
2 the ALJ's decision. *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
3 When the evidence is inconclusive, "questions of credibility and
4 resolution of conflicts in the testimony are functions solely of the
5 Secretary." *Sample v. Schweiker*, 694 F.2d 639, 642 (9th Cir. 1982).

6 The ALJ has a special duty in social security cases to fully and
7 fairly develop the record in order to make an informed decision on a
8 claimant's entitlement to disability benefits. *DeLorme v. Sullivan*, 924
9 F.2d 841, 849 (9th Cir. 1991). Because disability hearings are not
10 adversarial in nature, the ALJ must "inform himself about the facts
11 relevant to his decision," even if the claimant is represented by counsel.
12 *Id.* (quoting *Heckler v. Campbell*, 461 U.S. 458, 471 n.1 (1983)).

13 Even if a reviewing court finds that substantial evidence supports
14 the ALJ's conclusions, the court must set aside the decision if the ALJ
15 failed to apply the proper legal standards in weighing the evidence and
16 reaching his or her decision. *Benitez v. Califano*, 573 F.2d 653, 655 (9th
17 Cir. 1978). Section 405(g) permits a court to enter a judgment
18 affirming, modifying, or reversing the Commissioner's decision. 42
19 U.S.C. § 405(g). The reviewing court may also remand the matter to the
20 Social Security Administration for further proceedings. *Id.*

21 B. The ALJ's Decision

22 The ALJ concluded Plaintiff was not disabled, as defined in the
23 Social Security Act, from December 31, 2008, through the date of the
24 ALJ's decision, September 18, 2014. (A.R. 20-21). The ALJ found that
25 Plaintiff did not make a showing of changed circumstances sufficient to

1 overcome the presumption of non-disability from the prior ALJ decision
2 in December 2010. (A.R. 16).

3 The ALJ found that Plaintiff has the following severe
4 impairments: history of testicular cancer status post right orchiectomy
5 without recurrence, cervical spine degenerative disc disease, right hand
6 osteoarthritis, right wrist pain and right knee degenerative changes.
7 (A.R. 13). The ALJ determined that Plaintiff's depression is not severe.
8 (A.R. 13-14). Specifically, the ALJ found that Plaintiff has mild
9 restrictions in daily living activities, social functioning and
10 concentration, persistence or pace. (A.R. 14). The ALJ also determined
11 that Plaintiff experienced no episodes of decompensation of extended
12 duration. (*Id.*). The ALJ noted that Plaintiff was able to drive a car,
13 attend school, ride a motorcycle, ride a bike, care for his daughter and
14 engage in outdoor activities with her and was a jeweler for a hobby.
15 (*Id.*).

16 The ALJ further found that Plaintiff did not have an impairment
17 or combination thereof that meets or is medically equivalent to the
18 severity of one of the listed impairments in 20 C.F.R. Part 404, Subpart
19 P, Appendix 1 (20 C.F.R. §§ 404.1520(d), 404.1525, 404.1526,
20 416.920(d), 416.925 and 416.926) because "[n]o physician has credibly
21 opined that the [Plaintiff's] conditions meet or equal any listing, and the
22 state agency program physicians opined that they do not." (A.R. 15).

23 Moreover, the ALJ found that Plaintiff has the residual functional
24 capacity ("RFC") to "perform the full range of heavy work as defined in
25 20 CFR [§§] 404.1567(d) and 416.967(d)" with no mental limitations.

1 (A.R. 15, 18). In making this finding, the ALJ noted that Plaintiff's
2 statements regarding the intensity, persistence, and limiting effects of
3 his symptoms "are not entirely credible" and the objective medical
4 evidence does not support Plaintiff's alleged symptoms. (A.R. 16).
5 Based on the VE's testimony, the ALJ found that Plaintiff is capable of
6 performing past relevant work as a newspaper deliverer and auto
7 service supervisor because his RFC permits him to perform these jobs
8 as they are generally performed. (A.R. 20). The ALJ specifically noted
9 the following to be of particular relevance:

10 1. Plaintiff's Testimony

11 Plaintiff alleged that since December 31, 2008, pain in his neck,
12 arm, hand, wrist and knee limits his abilities to perform postural and
13 manipulative movements such as sitting, standing, walking and lifting
14 and carrying. (A.R. 16). He alleged that his disability is due to mental
15 and physical injuries. (*Id.*). The ALJ, however, found that Plaintiff's
16 allegations concerning the intensity, persistence and limiting effects of
17 his symptoms were "not entirely credible". (*Id.*). Specifically, the ALJ
18 found that Plaintiff's allegations of disabling mental and physical
19 limitations are unsupported by objective medical evidence. (*Id.*).

20 Plaintiff was diagnosed with and treated for testicular cancer in
21 2006, completed chemotherapy by January 2, 2007 and was able to
22 resume full-time work delivering newspapers and performing manual
23 labor. (A.R. 16-17). The ALJ noted that Plaintiff does not allege
24 current impairment due to cancer and no evidence of cancer recurrence
25 exists. (A.R. 17).

1 Plaintiff alleged three motor vehicle accidents in 2008 and another
2 in 2011. (*Id.*). The ALJ incorporated by reference the prior ALJ's 2010
3 decision and stated that Plaintiff's "exaggeration of the severity of these
4 accidents and the lack of objective evidence of injury impair the
5 [Plaintiff's] credibility." (*Id.*). Particularly, the ALJ noted that after
6 Plaintiff's December 20, 2008 motorcycle accident, he complained of
7 bilateral knee, wrist and left thumb pain, but radiographs of Plaintiff's
8 pelvis and bilateral knees were negative. (*Id.*). The ALJ also
9 acknowledged that Plaintiff was discharged from the emergency
10 department with no prescriptions and was walking appropriately. (*Id.*).

11 With respect to Plaintiff's October 4, 2011 motorcycle accident, the
12 ALJ noted that on October 10, 2011, Plaintiff was not taking any
13 medications, and that in a November 2011 neurologic exam, Plaintiff
14 "walked with a limp but was nonetheless able to toe, heel and tandem
15 walk" and showed no evidence of focal weakness or atrophy of the upper
16 or lower extremities, except for his right thumb muscles. (A.R. 17). On
17 May 21, 2012, Plaintiff complained of foot pain, but his radiographs
18 were normal, except for hallux valgus. (*Id.*). The ALJ noted that
19 Plaintiff's behavior during his July 2, 2012 appointment "indicated no
20 credible concern for a foot injury." (*Id.*).

21 On February 11, 2013, Plaintiff reported that he was not taking
22 any medications, and his doctor deemed him fully functional and
23 independent. (A.R. 17). On March 11, 2013, Plaintiff demonstrated
24 attentiveness, intact comprehension, good memory, normal muscle bulk
25

1 and tone, full motor strength in his upper and lower extremities and an
2 antalgic gait with difficulty bearing weight on his left foot. (*Id.*).

3 In July 2013, Plaintiff alleged that he fell in his shower due to
4 weakness in his right knee. (*Id.*). Plaintiff's July 2013 exam revealed
5 no cervical spine tenderness and no acute cervical spine injury. (*Id.*).
6 The ALJ noted that although a November 2010 MRI showed evidence of
7 some degenerative changes to Plaintiff's right knee's medial meniscus, a
8 later November 2013 examination revealed no tear and his right knee
9 exam results were normal. (A.R. 18). The ALJ also mentioned that on
10 March 17, 2014, Plaintiff demonstrated five-out-of-five muscle strength
11 of his quadriceps. (*Id.*). Moreover, the ALJ found that Plaintiff's
12 continued bike riding suggests "retained function, strength and mobility
13 of his lower extremities." (*Id.*).

14 In addition, the ALJ noted that Plaintiff's description of his daily
15 activities contradicts his allegations of disabling symptoms and
16 limitations. (*Id.*). The ALJ specified that Plaintiff "drove a car, went to
17 school, rode a motorcycle, rode a bike, was a jeweler for a hobby, cared
18 [for] his young daughter [by] taking her to school and engaged in
19 outdoor activities with her." (*Id.*). Although Plaintiff alleged that he
20 requires a cane to assist his ambulation, the ALJ noted that a doctor
21 did not prescribe a cane, Plaintiff did not consistently bring his cane to
22 his doctor appointments and Plaintiff's cane did not appear as worn as
23 it should be. (A.R. 18-19).

24 Furthermore, the ALJ pointed to Plaintiff's concession that his
25 doctors did not believe his condition to be permanently disabling,

1 inconsistent statements about his depression and lack of motivation to
2 obtain gainful employment during periods of no alleged limitations to
3 support his finding that Plaintiff's allegations are not credible and
4 unsupported by objective medical evidence (A.R. 19).

5 2. Third Party Function Report

6 On July 29, 2012, Michelle A. Lopez, Plaintiff's friend, submitted a
7 third party function report. (A.R. 19, 267-75). Ms. Lopez reported that
8 Plaintiff cares for his daughter, engages in outdoor activities with her,
9 cares for two puppies, shops in stores, drives a car and regularly
10 attends church. (A.R. 19). The ALJ gave little weight to Ms. Lopez's
11 description of Plaintiff's debilitation because they are based primarily
12 on what Plaintiff reported and displayed to her. (*Id.*). The ALJ also
13 found Ms. Lopez's description of Plaintiff's disability inconsistent with
14 her description of Plaintiff's daily activities. (*Id.*).

15 3. Joseph Watson, D.O.

16 Treating physician, J. Watson, D.O., opined that Plaintiff is
17 unable to care for his daughter and that his motorcycle accident injuries
18 interfere with his attention and concentration, require him to lie down
19 during the day, limit him to sitting and standing for only two to three
20 hours, require him to take unscheduled breaks, limit his carrying
21 capacity to ten pounds and cause significant manipulative limitations.
22 (A.R. 19-20, 521-29). The ALJ afforded little weight to Dr. Watson's
23 opinion because his progress notes contain few objective findings and
24 appear to be primarily based on Plaintiff's subjective reports. (A.R. 20).
25 The ALJ further noted that Dr. Watson's opinions were inconsistent

1 with the objective medical record, which indicates that Plaintiff
2 maintained his daily activities, retained good strength and mobility and
3 had no significant mental deficits. (*Id.*).

4 4. Mental Health Examinations

5 On March 25, 2013, consultative examiner, G. Nicholson, M.D.,
6 performed a comprehensive psychiatric evaluation on Plaintiff. (A.R.
7 14, 485-91). Dr. Nicholson reported that Plaintiff made good eye
8 contact, exhibited good social skills, was cooperative, had coherent and
9 organized thoughts, was alert and oriented, exhibited recollection and
10 ability to spell and had intact insight and judgment. (A.R. 14-15). Dr.
11 Nicholson found that Plaintiff had no mental health diagnosis and no
12 functional limitations. (A.R. 15).

13 Additionally, the State Agency's Psychological Consultant,
14 T. Schumacher, Ph.D., opined that Plaintiff had no severe mental
15 impairment. (*Id.*). The ALJ afforded substantial weight to both doctors'
16 opinions because Dr. Nicholson examined Plaintiff and Dr. Schumacher
17 reviewed Dr. Nicholson's reports and other record evidence. (*Id.*). The
18 ALJ further noted that both doctors' opinions were consistent with and
19 corroborate each other. (*Id.*).

20 5. State Agency Medical Consultant

21 State Agency Medical Consultant, D. Subin, M.D., opined that
22 Plaintiff "retains the capacity to perform medium exertion work with
23 frequent performance of postural movements." (A.R. 19, 132-44). The
24 ALJ accorded some weight to Dr. Subin's opinion. (A.R. 19). Although
25 the ALJ agreed that Plaintiff's physical impairments do not prevent

1 him from performing all work activity, the ALJ did not adopt Dr.
2 Subin's opinion that Plaintiff is limited to medium exertion work. (*Id.*).
3 Instead, the ALJ found that based on other evidence demonstrating
4 Plaintiff's strength, mobility, mental fitness and daily activities,
5 Plaintiff has retained capacity for heavy exertion work without postural
6 limitations. (*Id.*).

7 6. Robert J. MacArthur, M.D.

8 On March 23, 2013, consultative examiner, R. MacArthur, M.D.,
9 performed an orthopedic evaluation on Plaintiff. (A.R. 18, 476-82). The
10 physical exam showed that Plaintiff (1) had no atrophy of any muscle
11 group, (2) walked with normal posture, (3) had no difficulty rising on his
12 toes and heels, (4) did not have an antalgic gait, (5) had normal range of
13 motion and full motor strength in his upper and lower extremities, (6)
14 had full range of motion in his neck and back, (7) retained full range of
15 motion of all of his fingers, (8) had normal exam results for his feet, (9)
16 had normal sensations and reflexes and (10) had normal exam results
17 for his cervical and lumbar spine, as well as his right knee. (A.R. 18).

18 Dr. MacArthur diagnosed Plaintiff with right hand moderate
19 osteoarthritis, right foot mild scarring of the medial arch status post
20 injection and debridement with no findings of loss of motion. (*Id.*). The
21 ALJ afforded substantial weight to Dr. MacArthur's opinions, given
22 that Dr. MacArthur had the opportunity to personally examine Plaintiff
23 and review his diagnostic imaging, is board certified in orthopedics and
24 familiar with Social Security rules and regulations. (*Id.*). The ALJ
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1 further found that Dr. MacArthur's findings are supported by objective
2 medical evidence. (*Id.*).

3 7. Vocational Expert

4 At Plaintiff's July 15, 2014 hearing, VE Mark Remas testified that
5 Plaintiff's past relevant work in newspaper delivery is classified as
6 unskilled and light exertion, and his work in lubrication service is
7 classified as semi-skilled and medium work. (A.R. 20, 44-47). The ALJ
8 found that Plaintiff is able to perform the physical and mental demands
9 associated with his past relevant work as a newspaper deliverer and an
10 auto service supervisor because his RFC allows for a full range of heavy
11 exertion work. (A.R. 20).

12 C. Issues on Appeal

13 1. Effect of the Prior ALJ's Decision

14 a. *Res Judicata* Presumption of Non-Disability

15 As noted by the Defendant, the ALJ's decision clearly states, "the
16 presumption of non-disability is **not** rebutted." (A.R. 16) (emphasis
17 added). A review of the record shows Plaintiff erred in claiming that
18 "[t]he ALJ found the continuing presumption of non-disability
19 rebutted". (*Compare* A.R. 16, *with* ECF No. 20-1 at 8). Plaintiff does
20 not specifically argue any changed circumstances to overcome the
21 presumption of non-disability. (*See* ECF No. 20-1 at 7-8). Defendant
22 maintains that the current ALJ is bound by the prior ALJ's finding of
23 non-disability because Plaintiff failed to establish changed
24 circumstances to rebut the presumption of non-disability. (ECF No.
25 21-1 at 5). For the sake of thoroughness, the Court will nonetheless

1 evaluate whether Plaintiff has rebutted the presumption of
2 non-disability since the December 27, 2010 ALJ decision.

3 The Ninth Circuit acknowledged that “[t]he principles of *res*
4 *judicata* apply to administrative decisions, although the doctrine is
5 applied less rigidly to administrative proceedings than to judicial
6 proceedings.” *Chavez v. Bowen*, 844 F.2d 691, 693 (9th Cir. 1988)
7 (italics added). With respect to social security claims involving the
8 same parties, facts and issues as a prior claim, a presumption of non-
9 disability arises if an ALJ found the claimant not disabled in a prior
10 final decision. Acquiescence Ruling 97-4(9)³ accord *Chavez*, 844 F.2d at
11 693.

12 To overcome the presumption of continuing non-disability, the
13 claimant “must prove ‘changed circumstances’ indicating a greater
14 disability.” *Chavez*, 844 F.2d at 693 (citing *Taylor v. Heckler*, 765 F.2d
15 872, 875 (9th Cir. 1985)). Changed circumstances include a change in
16 the claimant’s age category, an increase in the severity of the claimant’s
17 impairments, existence of new impairments not previously considered
18 or a change in the criteria for determining disability. Acquiescence
19 Ruling 97-4(9). Moreover, a prior ALJ’s findings concerning the
20 claimant’s RFC, education and work experience are afforded some *res*
21 *judicata* consideration and will not be disturbed in a subsequent
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24 ³ Acquiescence Rulings “are binding on all components of the Social
25 Security Administration,” except under specified circumstances, and
accorded deference by a reviewing court. 20 C.F.R. § 402.35(b)(2).

1 disability claim, absent new and material evidence related to such
2 finding. *See Chavez*, 844 F.2d at 694; Acquiescence Ruling 97-4(9).

3 As noted earlier, Plaintiff does not specifically argue the existence
4 of changed circumstances and consequently provided no evidence in
5 support thereof. (*See* ECF No. 20-1 at 7-8). Defendant maintains that,
6 notwithstanding the current ALJ's additional findings of severe
7 impairments of cervical spine degenerative disc disease, right hand
8 osteoarthritis, right wrist pain and right knee degenerative changes,
9 Plaintiff did not establish changed circumstances indicating greater
10 disability because objective evidence demonstrated negative or at most
11 mild findings and no indication of disability with respect to these
12 impairments. (ECF No. 21-1 at 5-6).

13 In 2010, ALJ Carletti found that Plaintiff was not disabled, as
14 defined in the Act, from October 28, 2008 through December 27, 2010,
15 the date of his decision. (A.R. 101). ALJ Carletti determined that
16 Plaintiff had the following severe impairments: (1) status-post
17 testicular cancer and (2) a depressive order. (A.R. 96). The ALJ found
18 that Plaintiff had the RFC "capacity to perform the full range of light
19 work". (A.R. 97). In support of his findings, ALJ Carletti specifically
20 noted Plaintiff's 2006 testicular cancer, three motor vehicle accidents in
21 2008, depressive disorder diagnosis, complaints of continued pain and
22 objective medical opinions and examination results relating to these
23 events. (A.R. 97-100).

24 ALJ Carletti explained that Plaintiff finished cancer treatment in
25 2007, and no evidence of recurrence was present. (A.R. 98). The ALJ

1 further mentioned that although Plaintiff was involved in a motor
2 vehicle accident in March 2008, a hospital cleared Plaintiff with only
3 benign findings. (A.R. 97, 99). The ALJ noted that on Plaintiff's June
4 1, 2010 follow-up examination for another 2008 accident, the doctor
5 reported that Plaintiff retained full range of motion of his neck and
6 prescribed physical therapy for him. (A.R. 98). ALJ Carletti also
7 explained that there was no evidence of Plaintiff's current mental
8 status because the therapist had not examined Plaintiff since 2008, and
9 there was no evidence that Plaintiff was receiving mental health
10 services. (A.R. 99-100). As to Plaintiff's complaints of pain in his knees,
11 neck, right hand and right foot, the ALJ noted that his x-ray
12 examination revealed a loss of normal cervical lordosis without
13 compression fracture and mild multilevel degenerative disc disease
14 without subluxation, and the remaining radiographs were grossly
15 normal. (A.R. 100). ALJ Carletti ultimately found that Plaintiff's
16 objective medical record does not establish impairments likely to
17 produce disabling pain or other limitation as alleged for a period of
18 twelve or more months. (*Id.*).

19 The current ALJ found that, after reviewing Plaintiff's objective
20 medical evidence and opinion evidence, Plaintiff has not established
21 "changed circumstances" to overcome the continuing presumption of
22 non-disability arising from ALJ Carletti's 2010 decision. (A.R. 16). The
23 present ALJ determined that the record evidence did not reflect a more
24 adverse profile than that previously considered by ALJ Carletti. (*Id.*).
25 In an effort to meet his burden, Plaintiff alleged that, since the prior

1 decision, he was involved in an additional motorcycle accident, fell in
2 the shower due to his weak right knee and had worse pain in his neck,
3 back, hand and knee. (A.R.16-18).

4 On October 4, 2011, Plaintiff was admitted to a hospital due to a
5 third motorcycle accident and complained of pain in his chest, right
6 shoulder, pelvic, thigh and leg. (A.R. 542). However, the radiographs of
7 Plaintiff's right shoulder, wrist, forearm, knee and chest were negative,
8 and he was discharged from the hospital that same day. (A.R. 531-35,
9 540). Plaintiff's November 2011 radiographs of his right ankle, knee,
10 wrist and hand similarly do not support his claims of disabling pain
11 because these examinations revealed no abnormalities, except for a few
12 cysts in Plaintiff's right knee, dorsal subluxation of the distal radial
13 ulnar joint and bone cyst, diffusely macerated and torn ulnar, some
14 mild edema and ganglion cyst and mild osteoarthritis. (A.R. 322-23,
15 354-56).

16 In July 2013, Plaintiff allegedly fell in the shower due to his weak
17 right knee. (A.R. 621). Plaintiff's complaints of his knee locking,
18 popping and causing excruciating pain, however, are inconsistent with
19 his refusal to receive pain medication and the examiner's finding of
20 five-out-of-five muscle strength in Plaintiff's quadriceps on March 17,
21 2014. (A.R. 633-32). Additionally, Plaintiff's statement that he rides
22 his bike to keep in shape indicates retained function, as well as strength
23 and mobility of his lower extremities. (A.R. 638).

24 Following the prior ALJ decision, Plaintiff continued to drive his
25 truck, went to school, rode his motorcycle, rode his bike, worked on

1 jewelry as a hobby, cared for his young daughter, attended church and
2 went to the movie theater, parks and beaches often. (A.R. 41, 339, 485,
3 545-46, 269-62). Plaintiff's daily activities contradicts his claim that his
4 ability to sit, stand, walk, lift and carry and perform postural and
5 manipulative movements is severely limited. (A.R. 34-39, 41, 43-44).
6 Additionally, objective medical evidence does not support Plaintiff's
7 allegations that the pain in his neck, back, hand and knee have
8 worsened. For example, Plaintiff had a supple neck, no jugular venous
9 distention and no thyromegaly. (A.R. 633). Despite Plaintiff's report of
10 chronic neck pain, a doctor found moderate degenerative disk disease
11 but no significant spinal stenosis and no acute cervical spine injury.
12 (A.R. 705). Further, Plaintiff had only mild arthritis on his right hand,
13 which had no effect on his fingers' full range of motion. (A.R. 480).
14 Plaintiff also had a negative right knee exam. (A.R. 650).

15 On this record, the Court finds that Plaintiff's impairments have
16 not increased in severity since the prior ALJ decision. The Court,
17 therefore, finds that Plaintiff has not presented any persuasive evidence
18 indicating a greater disability since ALJ Carletti's decision in 2010. *See*
19 *Chavez*, 844 F.2d at 693. Consequently, Plaintiff has failed to rebut the
20 continuing presumption of non-disability.

21 b. The ALJ's Finding of a Less Restrictive RFC

22 Plaintiff contends that the current ALJ did not properly consider
23 the previous ALJ's decision because he did not point to evidence of
24 medical improvement to support his finding of a greater functional
25 ability than what the prior ALJ found. (ECF No. 20-1 at 7-8).

1 Specifically, Plaintiff argues that the ALJ did not properly consider
2 Plaintiff's previous impairments of testicular cancer and depressive
3 order. (ECF No. 20-1 at 8). Defendant asserts that "the ALJ is not
4 bound to find the same RFC as the previous ALJ decision." (*Id.* at 7).

5 As indicated earlier, a prior "administrative law judge's findings
6 concerning [a] claimant's [RFC], education, and work experience are
7 entitled to some *res judicata* consideration in subsequent proceedings."
8 *Chavez*, 844 F.2d at 694 (italics added). Accordingly, the Commissioner
9 has instructed that where the ALJ's final decision of non-disability on
10 the prior claim "contained findings on the claimant's [RFC], education,
11 and work experience, [the Social Security Administration] may not
12 make different findings in adjudicating the subsequent disability claim
13 **unless there is new and material evidence relating to the**
14 **claimant's [RFC]**, education or work experience." Acquiescence
15 Ruling 97-4(9) (emphasis added); *see Stubbs-Danielson v. Astrue*, 539
16 F.3d 1169, 1173 (9th Cir. 2008) (noting that in *Chavez*, 844 F.2d at 694,
17 the Ninth Circuit explained that a previous ALJ's RFC finding can be
18 reconsidered upon "new information not presented to the first judge.").

19 In the present decision, the ALJ adopted a less restrictive RFC for
20 Plaintiff than the one adopted by ALJ Carletti in 2010. (A.R. 16). ALJ
21 Carletti found that Plaintiff had the RFC for light work. (*Id.*). The
22 current ALJ found that Plaintiff had the RFC for heavy work. (*Id.*).
23 Here, the ALJ explained that "evidence supports greater functional
24 ability than previously determined by Judge Carletti." (*Id.*).
25

1 First, contrary to Plaintiff's assertions, the present ALJ did
2 consider Plaintiff's history of testicular cancer and depressive order.
3 (See A.R. 16, 17, 19). The ALJ cited medical reports indicating that
4 Plaintiff completed cancer treatment in 2007 and that no evidence of
5 cancer recurrence exists (A.R. 692-93, 700). The ALJ also noted that
6 Plaintiff does not allege any impairments related to his cancer. (See
7 A.R. 40). As to Plaintiff's depressive disorder, the ALJ noted that
8 during a March 2013 psychiatric examination, Plaintiff reported to Dr.
9 Nicholson that "he has not been feeling depressed" and denied any
10 history of suicidality and symptoms related to psychosis, mania or
11 anxiety disorders. (A.R. 486). Indeed, Dr. Nicholson stated that
12 Plaintiff does not appear to have any psychiatric disorder. (A.R. 489).

13 Second, the ALJ specifically found that objective record evidence
14 no longer supported Plaintiff's more restrictive RFC from 2010. (A.R.
15 16). For example, the ALJ noted that at a February 2013 medical
16 check-up, Dr. Millard reported that Plaintiff was "fully functional and
17 independent" and not taking any medications. (A.R. 699). As noted
18 previously, on March 23, 2013, Dr. MacArthur physically examined
19 Plaintiff and opined that Plaintiff demonstrated no difficulty rising on
20 his toes and heels, normal posture, no antalgic gait, normal range of
21 motion and full motor strength in his upper and lower extremities.
22 (A.R. 479-80). Dr. MacArthur further determined that Plaintiff can lift
23 and carry up to 100 pounds, that he can stand and walk without
24 limitations during a normal workday, that he does not need a cane for
25 ambulation assistance, that he can sit, climb, balance, kneel, crawl and

1 crouch without restrictions and that he can reach, feel and perform
2 gross and fine manipulation without limitations. (A.R. 481-82). The
3 ALJ also pointed to Plaintiff's own description of his daily activities
4 such as driving his truck, riding his bike to keep in shape, engaging in
5 outdoor activities with his young daughter and caring for her as further
6 evidence that Plaintiff's capacity is not limited to light work. (A.R. 19).
7 The ALJ concluded that based on objective medical evidence, Plaintiff
8 has demonstrated greater functional ability than in 2010 and retains
9 the capacity to perform heavy exertion work with no mental or postural
10 limitations. (*See* A.R. 16-19).

11 The Court finds that the ALJ did not err in failing to adopt
12 Plaintiff's December 2010 RFC because the ALJ relied on sufficient new
13 and material evidence in the record to support a new RFC finding.
14 Acquiescence Ruling 97-4(9) (instructing that an adjudicator may adopt
15 a different RFC if there is new and material evidence relating to that
16 determination); *see also Stubbs-Danielson*, 539 F.3d at 1173; *Chavez*,
17 844 F.2d at 694.

18 2. Plaintiff's Need for an Assistive Device

19 Plaintiff contends that the ALJ improperly rejected the opinions of
20 Dr. Brownell, a treating physician, regarding Plaintiff's need for an
21 assistive device, namely a cane. (ECF No. 20-1 at 9). Plaintiff appears
22 to concede that a cane was not medically necessary until November
23 2013,⁴ when Dr. Brownell reported "gait abnormality with cane
24

25 ⁴ "What was true in March 2013 ceased to be true by November 2013."
(ECF No. 20-1 at 10).

dependence”. (*Id.* at 10). Plaintiff asserts that the ALJ’s failure to consider Plaintiff’s need for a cane in assessing his RFC materially affects the disability analysis and constitutes reversible error. (*Id.*)

Defendant argues that substantial evidence supported the ALJ’s RFC finding, which did not include a limitation for an assistive device. (ECF No. 21-1 at 9-10). Specifically, Defendant asserts that Dr. MacArthur’s opinion that Plaintiff has no standing or walking limitations and did not need an assistive device is consistent with several other medical reports stating that Plaintiff does not need an assistive device despite his mild antalgic gait. (*Id.* at 10-11). Defendant further contends that Plaintiff’s daily activities contradict the need for a cane. (*Id.* at 12-13).

The Ninth Circuit distinguishes among the opinions of three types of physicians: (1) those who treat the Plaintiff (“treating physicians”); (2) those who examine but do not treat the Plaintiff (“examining physicians”); and (3) those who neither examine nor treat the Plaintiff (“non-examining physicians”). *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). As a general rule, more weight is given to the opinions of a treating source than to that of a non-treating physician. *Id.* (citing *Winans v. Bowen*, 853 F.2d 643, 647 (9th Cir. 1987)). Likewise, the opinion of an examining physician is typically entitled to greater weight than that of a non-examining physician. *Pitzer v. Sullivan*, 908 F.2d 502, 506 (9th Cir. 1990).

In *Orn v. Astrue*, 495 F.3d 625 (9th Cir. 2007), the Ninth Circuit held:

1 If a treating physician's opinion is not given 'controlling
2 weight' because it is not 'well-supported' or because it is
3 inconsistent with other substantial evidence in the record,
4 the Administration considers specified factors in
5 determining the weight it will be given. Those factors
6 include the 'length of the treatment relationship and the
7 frequency of examination' by the treating physician; and the
8 'nature and extent of the treatment relationship' between
9 the patient and the treating physician. Generally, the
10 opinions of examining physicians are afforded more weight
11 than those of non-examining physicians, and the opinions of
12 examining non-treating physicians are afforded less weight
13 than those of treating physicians.

14 *Id.* at 631 (internal citations omitted).

15 Where a non-treating, non-examining physician's opinion
16 contradicts the treating physician's opinion, the ALJ may only reject the
17 treating physician's opinion "if the ALJ gives specific, legitimate reason
18 for doing so that are based on substantial evidence in the record."
19 *Jamerson v. Chater*, 112 F.3d 1064, 1066 (9th Cir. 1997) (quoting
20 *Andrews*, 53 F.3d at 1041). "The ALJ may meet this burden by setting
21 out a detailed and thorough summary of the facts and conflicting
22 evidence, stating his interpretation thereof, and making findings."
23 *Morgan v. Apfel*, 169 F.3d 595, 600-601 (9th Cir. 1999) (citing
24 *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir.1989)). Reports of
25 consultative physicians requested by the Commissioner may serve as
substantial evidence. *Andrews*, 53 F.3d at 1041.

Here, there is no medical documentation in the record establishing
the need for an assistive device. Although Plaintiff is correct that the
record contains references to his use of a cane, those notations are

1 traceable to Plaintiff's own subjective reports⁵ and to the examiner's
2 mere observations that Plaintiff presented with an assistive device.
3 Plaintiff would have the Court interpret Dr. Brownell's November 7,
4 2013 medical observation that Plaintiff is a "39yo male with falls and
5 gait abnormality cane dependent" as establishing the need for a cane,
6 but this statement is neither a prescription for a cane nor medical
7 advice to use a cane. (A.R. 628). It was simply an observation.
8 Nowhere in Dr. Brownell's treatment report does it indicate that a cane
9 is medically necessary. (*See* A.R. 627-29). In addition, on November 13,
10 2013, Frank B. Hamlett, M.D. examined Plaintiff's right knee images
11 and opined that the results were negative. (A.R. 650 (reporting normal
12 bones, normal soft tissues, normal alignment and position and
13 well-maintained joint spaces)). Notably, Dr. Brownell's most recent
14 treatment report in May 2014 makes no mention of Plaintiff's cane or
15 gait. (*See* A.R. 638-40). It does, however, mention that Plaintiff "rides
16 [his] bike to keep in shape". (*Id.* at 638). Because Dr. Brownell did not
17 make any objective determinations with respect to Plaintiff's need for a
18 cane, there was nothing for the ALJ to reject or discredit. (*See* A.R.
19 627-29, 638-40).

20 Instead, the ALJ properly relied on examining physician, Dr.
21 MacArthur, who did make objective determinations regarding Plaintiff's
22 use of and need for a cane. (*See* A.R. 476-82). Like Dr. Brownell, Dr.

24 ⁵ In Plaintiff's Function Report, he indicated that a doctor prescribed a
25 cane in 2001. (A.R. 264). Plaintiff, however, has not presented any
medical prescriptions for a cane to support his assertions.

1 MacArthur noted that Plaintiff presented with a cane. (A.R. 479). Dr.
2 MacArthur, however, went further and pointed out that the cane shows
3 no wear and was not medically prescribed. (*Id.*). Dr. MacArthur
4 observed Plaintiff get on and off the examination table without
5 assistance, rise on his heels and toes without difficulty and walk
6 steadily without his cane. (*Id.*). In light of his observations, Dr.
7 MacArthur explicitly determined that Plaintiff does not need a cane for
8 ambulating. (*Id.* at 481); *Rounds v. Comm'r Soc. Sec. Admin.*, 807 F.3d
9 996, 1006 (9th Cir. 2015) (noting that an ALJ may rationally rely on
10 specific unambiguous imperatives regarding a claimant's limitations).
11 No medical documentation in the record is expressly contrary.
12 Accordingly, the Court finds that the ALJ did not err in making an RFC
13 finding that does not include a limitation for an assistive device.

14 3. Plaintiff's Ability to Engage in Manipulative Activity

15 Plaintiff contends that the ALJ failed to articulate specific and
16 legitimate reasons for rejecting former treating physician, Dr. Watson's
17 September 2011 medical opinion that Plaintiff could engage in
18 manipulative activity with his right hand for only five percent of the
19 day. (ECF No. 20-1 at 11-12). Plaintiff asserts that the record contains
20 ample objective evidence demonstrating Plaintiff's right hand
21 limitations, including Dr. MacArthur's finding of moderate
22 osteoarthritis in Plaintiff's right hand. (*Id.* at 11). Defendant argues
23 that substantial evidence support the ALJ's finding that Dr. Watson's
24 assessment was inconsistent with other evidence in the record. (ECF
25 No 21-1 at 14). Defendant further maintains that although Dr.

1 MacArthur found subluxation in Plaintiff's right hand, Dr. MacArthur
2 ultimately determined that it had no effect on the range of motion of
3 Plaintiff's fingers. (*Id.* at 16).

4 Here, the ALJ rejected Dr. Watson's opinions regarding Plaintiff's
5 right hand manipulative limitations because they appeared primarily
6 based on Plaintiff's subjective reports and contained few objective
7 findings to support his diagnoses. (A.R. 523-26 (documenting mostly
8 Plaintiff's own descriptions of his pain and limitations)). The ALJ
9 further explained that Dr. Watson's opinion that Plaintiff could not lift
10 more than ten pounds and has significant manipulative limitations is
11 inconsistent with evidence demonstrating Plaintiff's retained strength
12 and mobility and his ability to maintain his daily activities. (A.R.
13 19-20). Specifically, in February 2013, Plaintiff was found to be "fully
14 functional and independent". (A.R. 699). In March 2013, Plaintiff could
15 "move all extremities", his right hand arthritis or subluxation had "no
16 effect on [the] range of motion of all fingers" and "manipulation [could]
17 be done without limitations." (A.R. 701, 480-82). In July 2013, Plaintiff
18 had full motor strength of all hand muscles, and in May 2014, Plaintiff
19 reported that he "rides [his] bike to keep in shape." (A.R. 705, 638).

20 Because a review of Dr. Watson's reports reveal that they contain
21 conclusory diagnoses and are largely based on Plaintiff's self-reports,
22 the ALJ properly afforded little weight to Dr. Watson's opinions.⁶ The

23
24 ⁶ The ALJ found Plaintiff's statements regarding the limiting effects of
25 his medical condition "not entirely credible". (A.R. 16). "An ALJ may
reject a treating physician's opinion if it is based 'to a large extent' on a
claimant's self-reports that have been properly discounted as

1 ALJ's adoption of Dr. MacArthur's opinion that Plaintiff's manipulative
2 ability warrants no restriction constitute substantial evidence. The
3 Court finds such reliance was not error because, as the ALJ pointed out,
4 Dr. MacArthur examined Plaintiff, specializes in orthopedics, is familiar
5 with Social Security rules and regulations and his finding is consistent
6 with objective medical evidence of record. *See* 20 C.F.R.
7 § 404.1527(c)(3)-(6). The Court, therefore, finds that the ALJ offered
8 specific and legitimate reasons for rejecting Dr. Watson's opinion based
9 on substantial evidence. *Jamerson*, 112 F.3d at 1066.

10 The ALJ clearly relied on the findings of the treatment record and
11 reports cited in the administrative record. The ALJ's findings are
12 consistent with the record as a whole. Section 416.920b of Title 20 of
13 the Code of Federal Regulations states that after reviewing all of the
14 evidence relevant to a claimant's claim, the ALJ makes findings about
15 what the evidence shows. The ALJ is also "responsible for making the
16 determination or decision about whether [a claimant] meet[s] the
17 statutory definition of disability." 20 C.F.R. § 416.927(d)(1). The
18 Court's review of the administrative record revealed no ambiguity or
19 error indicating that the ALJ's decision was based on less than
20 substantial evidence. 42 U.S.C. § 405(g).

21 Accordingly, the Court finds the ALJ's findings of fact and
22 conclusions of law, including Plaintiff's RFC, is supported by
23 substantial evidence and free of legal error. Additionally, the Court

24
25 _____
incredible." *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008))
(internal citations omitted)).

1 finds that there are no changed circumstances warranting a different
2 outcome from the 2010 ALJ decision.

3 **III. CONCLUSION**

4 The Court **RECOMMENDS** that Plaintiff's Motion be **DENIED**
5 and that Defendant's Motion be **GRANTED**. This Report and
6 Recommendation of the undersigned Magistrate Judge is submitted to
7 the United States District Judge assigned to this case, pursuant to the
8 provisions of 28 U.S.C. § 636(b)(1).

9 **IT IS HEREBY ORDERED** that any written objections to this
10 report must be filed with the court and served on all parties no later
11 than **April 24, 2017**. The document should be captioned "Objections to
12 Report and Recommendation."

13 **IT IS FURTHER ORDERED** that any reply to the objections
14 shall be filed with the court and served on all parties no later than **May**
15 **1, 2017**. The parties are advised that failure to file objections within
16 the specific time may waive the right to raise those objections on appeal
17 of the Court's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

18 Dated: April 10, 2017



Hon. Mitchell D. Dembin
United States Magistrate Judge